STATE OF VERMONT

HUMAN SERVICES BOARD

In re	)	Fair Hearing No. S-07/14-537
	)	& S-07/14-538
Appeal of	)	

INTRODUCTION

The petitioners, the parents of the young children at issue here, have consolidated an appeal of separate substantiations against them for "risk of harm" arising from the same set of facts regarding drug paraphernalia which occurred on April 1, 2013. In addition, the petitioner-mother appeals three additional substantiations made only against her for "abuse of a child" and "risk of harm to a child" based on the death of her infant on April 1, 2013, and another for "risk of harm" based on an incident on September 14, 2013 in which her three-year-old child was reported to have possibly ingested a controlled substance. The parties requested that all five of these substantiations be heard at the same time.

The petitioners, who are *pro se*, appealed the findings to the Commissioner who, after consideration and re-consideration (following receipt of the autopsy report), upheld all five substantiations. The petitioners appealed to the Board and were advised to get an attorney. When they

were unable to obtain an attorney, they were given ample time over a number of months to examine and understand DCF's case against them, and to prepare their questions and rebuttal. On the day of the hearing, only the petitioner-mother was able to attend because petitioner-father stayed with a sick child. DCF presented four witnesses, two social workers and two police officers. Another witness DCF had called with regard to the September 14, 2013 incident, failed to appear. DCF did not ask to continue the hearing to recall that witness.

Petitioner-father was provided a tape of the hearing and documents which were admitted and asked whether he wanted to bifurcate his hearing or continue to join in this one, even though he was absent. He was advised that if he had his own hearing, he could examine the witnesses himself and offer any additional challenges he wished to. Petitioner-father said he accepted the evidence offered by DCF at petitioner-mother's hearing and was satisfied with the cross-examination of the witnesses done by petitioner-mother. He had no testimony to add of his own. He did, however, present a letter from his pediatrician attesting to his fitness as a parent and describing the cause of death of their child. DCF did not object to the admission of the letter. The

petitioner-father asked, in addition, to re-convene the hearing for his pediatrician to testify. That request was denied upon objection by DCF as irrelevant and onerous as the petitioner could not connect the pediatrician with any direct knowledge of the facts surrounding his substantiation.

FINDINGS OF FACT

1. In the fall of 2012, the petitioners, who are domestic partners, were parents of a three-year-old daughter and were expecting another child. In November of 2012, when she was six months pregnant, the petitioner-mother was injured in a car accident in which she fractured her ankle. The petitioner was treated with narcotic pain-relievers to which she became addicted.

2. The petitioner was considered a high-risk pregnancy due to her addiction to the narcotics and was in the care of doctors at a large teaching hospital which handled such pregnancies. As part of her treatment, the petitioner took a four week pre-natal drug class, did individual counseling, and started treatment with Suboxone, another opioid substance, to wean her off the narcotics. The petitioner, in addition, to Suboxone, also has a prescription for Ritalin for ADHD and Klonopin for anxiety.

3. The infant girl was born on February 4, 2013. At that time she exhibited symptoms of addiction and went through withdrawal treatment. The petitioner, unhappy with her treatment at the teaching hospital, decided to switch to a local pediatrician who followed the child for the next two months.

Facts Concerning Substantiations for Child Neglect and Risk of Harm Against the Petitioner-Mother Based on the Death of Her Infant

4. The evidence is undisputed that the petitioners were living together in an apartment in Vermont and had gone to bed, along with their children, the three-year-old child and the infant, early in the morning. Sometime around 9:00 a.m. on April 1, 2013, the petitioner-father awoke to find the infant non-responsive. He called emergency services and woke the petitioner-mother. The petitioner-mother and an upstairs neighbor tried to revive the infant while they waited for an ambulance to arrive. Feeling it was taking too long, the petitioner-mother and the neighbor drove the infant to a hospital close to their home while petitioner father stayed with their three-year-old child at home. Doctors were unable to revive the infant and declared her dead. One of the

doctors involved was a pediatrician in practice with the infant's own pediatrician.

5. A lieutenant from the Vermont State Police interviewed the petitioners following the infant's death. The police lieutenant did not describe the petitioner-mother or petitioner-father as impaired during the interview, which occurred shortly after the infant was declared dead and about six hours after the child was put to bed. She recorded their statements at the time and recounted those statements at the hearing.

6. The petitioners do not disagree with the statements made by the lieutenant and, in fact, the petitioner-mother offered her statements again which were substantially similar to that offered by the lieutenant. The following three paragraphs summarize those statements and are found as facts for purposes of this decision.

7. The family had been at the home of the petitioner - father's parents in New Hampshire on March 31, 2013, celebrating Easter. The petitioner-father spent most of the day working on a car for the petitioner-mother as hers had been destroyed in the accident in the fall of 2012. The petitioner-father denies using any alcohol or drugs on this

day but he thinks the petitioner-mother might have used some marijuana at some point during the day.

8. The petitioner-mother was caring for the children that day. In the late afternoon, she was offered some marijuana by another visiting relative and she accepted. She says she took one "hit" to relieve her anxiety, because she could not use her Klonopin that day, but that she did this outside of the presence of the children. The children's grandmother cared for them during the time she was using the drug.

9. The family arrived back home in Vermont about 1:00 a.m. The petitioner-mother bathed the three year old and put her to bed. The infant was fussy due to a cold and the couple watched a movie while they tried to get her to sleep. The petitioner-mother finally said she needed to go to sleep and laid down on the bed and left the infant in her father's care. The petitioner-father continued to feed the infant. He put the infant down on the bed next to the petitioner-mother because the infant would not sleep in the bassinette. The petitioner-mother was falling asleep but was aware that the infant had been placed on the bed. She does not remember anything after that. The petitioner-father, thereafter, laid down next to the infant putting his leg on the floor. He

says he always wakes up to turn over and did not feel he was placing the infant in danger. He then fell asleep around 4:30 a.m. The infant had a doctor's appointment at 8:30 a.m. which they intended to go to but the alarm failed to go off. The petitioner-father awoke at 9:00 a.m. and saw that the infant looked strange and determined that she was not breathing.

10. The petitioner-mother said they do not usually put the infant in the bed with them but that the infant was being particularly fussy that evening and petitioner-father needed to get some sleep. They said sometimes their three year old enters their room during the night and wants to get into the bed but they only allow her to sleep at the foot of the bed. This testimony is uncontradicted and is adopted as a fact herein.

11. The petitioner-mother underwent a drug battery test on April 3, 2013 at the request of the police. The drug battery she took was considered a screen and not dispositive for medical or legal purposes. That drug battery showed a likely use of Ritalin, Suboxone and marijuana in the recent past. Although, this is just a "screen," it is consistent with the petitioners' testimony and is adopted as a fact

herein. The "screen" did not indicate the level of the drug or whether the petitioner might have been impaired.

12. The lieutenant from the Vermont State Police observed the infant's body along with the medical examiner. The lieutenant did not observe any signs of trauma on the child.

13. On April 2, 2013, DCF filed for and was granted temporary custody of the three-year-old child pending the outcome of the investigation into the death of the infant.

14. The autopsy report issued in June 18, 2013, was inconclusive as to the cause of death. It was noted, however, that factors which could have contributed to the death were that the infant had slight acute bronchopneumonia and that the parents had been sharing a bed with the child. The report stated that the child was "well-developed, well-nourished, and well-hydrated." No injuries to the body were found. There was no evidence that the child had been crushed or had suffocated, and no finding that the child being in bed with the parents had actually caused her death. The autopsy report could draw no conclusion as to the cause of death. This report is accepted as credible evidence of the child's physical condition at the time of her death.

15. A letter dated May 6, 2015 from the children's pediatrician, who is also in medical practice with the pediatrician who tried to resuscitate the infant at the ER, described the infant's death as due to SIDS (Sudden Infant Death Syndrome). This letter is accepted as a reasonable explanation for the infant's mysterious death.

16. The petitioners were not criminally charged in the death of their daughter. The Superior Court returned custody of their older daughter to the petitioners on August 30, 2013.

17. On October 25, 2014, DCF substantiated only the petitioner-mother for child abuse and for risk of harm based on the death of the infant

18. Petitioner-father was not included in these substantiations, although the uncontroverted evidence clearly demonstrated that he was the last person to care for the infant, that he had placed her in the bed, and he had made the decision to lie down and sleep next to the infant.

19. The evidence presented at hearing failed to show that either the petitioner-mother or petitioner-father were too impaired by alcohol or drugs to care for the infant in the early morning hours of April 1, 2013.

20. There is no evidence that the petitioner-mother had put the infant at risk by placing her in the care of petitioner-father while she went to sleep.

21. The evidence does not show that the infant either cried out or likely cried out during the four and a half hours she was sleeping before she was discovered lifeless. There is no evidence that there was an opportunity to save the child and that the parents failed to assist her.

Facts Concerning Substantiations Made Against Petitioner-Mother and Petitioner-Father for Risk of Harm For Allowing Unsupervised Access to Drug Paraphernalia

22. On October 25, 2013, both of the petitioners were substantiated for risk of harm to their three-year-old child based on the discovery of drug-related paraphernalia in the apartment on the day of the infant's death, April 1, 2013.

23. The petitioners agreed to a search of their apartment following the death of the infant. The reason for the search was to seize anything that might have revealed why the infant had died. It was expected that bedsheets, bottles, formula and the like would be taken. However when the police entered the apartment, they found a considerable quantity of what they described as paraphernalia used in the

administration of drugs which they also seized for the three-year-old's protection. They did not find any pills, liquids or drugs but noted that many of the seized items had caked substances on them.

24. Over thirty items were seized. DCF attempted to use the seizure of these items as reason to retain custody of the three year old at the CHINS hearing held on August 30, 2013. However, the Superior Court refused to consider the paraphernalia in and of itself harmful absent any testing done by DCF to show that any item contained controlled substances and returned the child to the parents.

25. On September 13, 2013, an analysis of the items seized in the apartment came back from the Vermont Department of Public Safety. The items catalogued included seven syringes (at least one of which was uncapped), a black rubber band, several cellophane wrappers with white powder on them, empty prescription bottles, Ziploc bags, glass tubes, a glass pipe with black residue, several measuring spoons, and a pill crusher. Many of the items were not tested. Of those that were, the analysis showed that 4 items (a syringe, 2 cellophane wrappers, and a pill crusher) contained residue of Methylphenidate (Ritalin). Two of the items, (a plastic spoon and a tea spoon) had residue of Buprenorphine

(Suboxone) on them. A glass tube was found to have a black and brown cocaine residue. In addition to Ritalin, the plastic pill crusher also had residue of Acetaminophen (aspirin) and Oxycodone (an opioid pain reliever).

26. A detective from the Vermont State Police testified that he searched the apartment, took photos, and collected evidence. He found several items in the bedroom, including an uncapped syringe lying near the bed. He said all of the items were within easy reach of the three-year-old child. He also found drug paraphernalia in the living room, dining room, and the kitchen, all in plain view and at a height accessible to a three year old. He could not recall the exact locations of most of the items although he does remember that there were two metal spoons in the kitchen caked with a white substance which was later shown to be Suboxone. He does not recall seeing a baby gate on the bedroom door. His testimony is found reliable and credible as to the state of the petitioners' apartment on April 1, 2013 and the accessibility of the items to children.

27. The lieutenant from the Vermont State Police who interviewed the petitioners also assisted with the seizure and inventory of the drug paraphernalia. She could not pinpoint specifically where each item was found but does

recall that there was an uncapped syringe in the bedroom next to the bed and two spoons near the kitchen sink that were caked with white residue. She does recall the paraphernalia was in more than one room of the apartment in places that were easily accessed by a three year old. Although she does not remember a baby-gate, she pointed out that the petitioner-mother's statement that the three-year-old comes into the bedroom at times during the night and sleeps at the foot of the bed, indicates to her that the bedroom is not always secured from the toddler. Her testimony is also found credible and reliable as to the state of the petitioner's apartment and the accessibility of the items to children.

28. The petitioner-mother did not dispute that the items were found in her apartment nor that they contained residues of controlled substances.

29. The petitioner-mother testified that her three year old could not have accessed these items because they were all behind a child gate in her bedroom. This testimony is found not credible based on the credible police description that the items were found not only in the bedroom but in the common rooms of the apartment. The petitioner's testimony that a child gate was keeping the three year old out of the bedroom is not credible either as such a gate was not

observed by either police officer and, as the lieutenant pointed out, the petitioner-mother herself stated that the child could come into the bedroom without impediment in the night.

30. The petitioner-father offered a statement from the three year old's pediatrician dated May 5, 2015, in rebuttal to DCF's case. That letter said that the pediatrician had cared for all of the petitioner's children since February of 2013, including a new child born in the fall of 2014, after these events had concluded. She stated that the three year old and the new infant had been in for well child visits and appropriate sick visits and had been immunized. She concluded by saying that she, as well as her colleague who had been present when the earlier infant could not be resuscitated, "do not have concerns about [the petitioners'] parenting of these young girls." While there is no reason to doubt the credibility of this statement as to the petitioners' seeking appropriate medical care for their children, it is not relevant on this particular issue as the pediatricians did not allege that they were present at the apartment on the day when the drug paraphernalia was discovered, had any knowledge that there was drug paraphernalia in the apartment, or had any information about

the petitioners' supervision of the three year old within the apartment.

31. Based on the credible testimony of the two police officers and the laboratory report of the Vermont Department of Safety, it is found that drug paraphernalia used in the administration of drugs, including some items with residues of potentially harmful controlled substances, were found in several rooms of the petitioners' residence. Those items were not secured and were within easy reach of the petitioners' three-year-old child.

32. In the absence of any claim by her parents of an extraordinary level of vigilance regarding this three year old, the ubiquitous presence of drug paraphernalia which obviously had been or was being used to administer drugs in almost every room of the apartment, including common areas, indicates that it was more likely than not that the child had unsupervised access to drug paraphernalia, including uncapped syringes, wrappers and spoons that were tainted with controlled substances, directly before or at the time when they were discovered on April 1, 2013.

Facts Relating to the Substantiation for Risk of Harm Against Petitioner-Mother For Putting Her Three-year-old at Risk for Ingesting Drugs

33. After DCF took custody of their three-year-old child, the petitioners moved to another apartment in their Vermont town and were joined there in June of 2013 by the petitioner-mother's brother, who is disabled.

34. Following the return of the three-year-old child to the petitioners on August 30, 2013, they moved out of state to live with the petitioner-father's family in New Hampshire. The petitioners showed credible documentation that their change of address occurred as of August 30, 2013. The brother continued to live in the apartment for a couple of more months after the petitioners left.

35. The petitioner-mother returned regularly to her prior apartment in Vermont to retrieve items which the family had left behind and to visit her brother.

36. A DCF social worker received a report on September 14, 2013 from a DCF client who described herself as a neighbor of the petitioners. The report alleged that she had seen the petitioner-mother at her prior apartment and observed the petitioner cleaning out a syringe by squirting

the liquid into a soda can. She thought the three year old might have sipped liquid from the same can. The social worker advised the neighbor to report the incident but, then, not sure that this would happen, reported the incident herself.

37. Following the report, either DCF or the police went to the petitioners' old apartment in the night-time looking for them and the three year old. They did not find the family but roused the petitioner-mother's brother who was sleeping. He reported that the family had moved to New Hampshire.

38. DCF, thereafter, unsuccessfully tried to have the three year old picked up in New Hampshire at the petitioners' new residence based on an emergency custody order. The petitioners refused to allow their daughter to go back into custody and the New Hampshire police would not intervene to enforce the Vermont order.

39. Two days later, on September 16, 2013, the petitioners were spotted at their old apartment in Vermont and DCF asked the police to stop them on their way out of town. The police stopped the petitioners and asked them to take their daughter to the hospital for drug testing. They agreed, although they declined to allow their daughter to be

interviewed by DCF without them present. The DCF social worker, however, explained that he had that right to interview her privately and took the three year old to a separate room for an interview.

40. The interview the social worker had with the three year old was not recorded and the worker admitted he was not sure that she was old enough to understand the difference between the truth and a lie. The worker offered only that the child agreed that she had vomited and agreed that she was afraid of her parents. The social worker could offer no context for the statements. This evidence is not sufficiently detailed nor reliable to make any finding that the child had ingested drugs from a soda can on September 14, 2013.

41. The medical reports on drugs in the child's system came back negative. DCF did not feel that test was dispositive of the matter, believing it was possible the drugs had dissipated over the last two days.

42. Based on the report from the neighbor and what the worker had learned from the child, DCF attempted to re-gain custody of the child by filing a new petition with the Superior Court on September 20, 2013. The Court denied the

request on September 23, 2013, finding that the family no longer resided in Vermont.

43. DCF, thereafter, substantiated the petitioner-mother for risk of harm for this incident on October 7, 2013.

44. The petitioner-mother's brother testified that he saw the petitioners and their three-year-old child on a regular basis during September and October of 2013 when they visited him at the old apartment. He never saw any abusive behavior towards the child while they were visiting him. His testimony is found to be credible.

45. The petitioner-mother also presented uncontroverted evidence that DCF notified the New Hampshire child welfare agency of their concerns after the Vermont Court refused to take jurisdiction; that New Hampshire opened a file on the family for an assessment; that the petitioners and the child's grandmother agreed to a safety plan on September 26, 2013; that the safety plan provided for the grandmother to report any concerns to a child protection social worker; that the worker would check with the family weekly; and that the petitioner-mother would agree to only use drugs prescribed for her and submit to regular drug testing. On February 14, 2014, New Hampshire notified the family that there was no

basis to found a substantiation and that supervision of the family would cease.

46. The petitioner-mother denied that her child had drunk from a soda can with drugs in it on the day in question or that she had become ill. She points out that the medical reports showed no toxic drugs in her body. DCF presented no evidence contradicting the veracity of the petitioner and the petitioner's claims are supported by the medical evidence. As such, they are found to be credible.

ORDER

The two decisions of the Department to substantiate the petitioner-mother and the petitioner-father for risk of harm due to exposing their three-year-old child to drug paraphernalia containing toxic residues is upheld. All the other substantiations against the petitioner-mother is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916. The statute provides an administrative review process to individuals challenging their placement in the registry. 33

V.S.A. § 4916a. At an administrative review, a report is considered substantiated if it is "based upon accurate and reliable information that would lead a reasonable person to believe that the child has been abused or neglected." 33 V.S.A. § 4912 (10). If the substantiation is upheld at the administrative review level, the individual can request a fair hearing pursuant to 33 V.S.A. § 4916b(a) and 3 V.S.A. §3091(a). The hearing is *de novo* and DCF has the burden of proving by a preponderance of the evidence the facts underlying the substantiation. *In re Bushey-Combs*, 160 Vt. 326 (1993), Fair Hearing Nos. R-06/11-394 and R-08/09-462.

The pertinent sections of 33 V.S.A. § 4912 define what the statute means by "abuse" and "risk of harm":

> (2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. An "abused or neglected child" also means a child who is sexually abused or at substantial risk of sexual abuse by any person.
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> (3) "Harm" can occur by
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> (a) Physical injury or emotional maltreatment;
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> . . .
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> (4) "Risk of harm" means a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse.
> . . .

> (6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

Substantiations for both Child Abuse and Risk of Harm of Abuse Against Petitioner-Mother Concerning the Death of Her Infant

The petitioner-mother was substantiated for both "abuse" and "risk of harm" in connection with the death of her infant on April 1, 2013. With regard to the former, the petitioner-mother can only have been found to have "abused" her infant if the infant's death was caused by her "acts or omissions." See 33 VSA § 4912 (2), (3) and (6) *supra.* DCF argues that the evidence shows that the infant was placed between two sleeping adults and that the petitioner was so impaired from using drugs the day before that she could not assist the child if she had cried out.

The preponderance of the evidence does not support DCF's claim. Although the evidence shows that the petitioner used some marijuana about 12 hours before, there is no evidence that she had been impaired at the time the infant was put to bed. Even if that were the case, the evidence clearly shows that she placed the infant in the care of another responsible adult, the infant's father, before she went to sleep.

Neither is there any evidence that the infant was actually injured by the sleeping mother. The autopsy did not indicate that the infant was smothered or suffocated but listed the child's underlying mild chronic bronchitis and the parent's bed sharing as possible contributing facts. The infant was found to be generally healthy and well-cared for. However, the cause of death could not be established and the pediatrician who attended the child at the emergency room labeled the infant a victim of SIDS (Sudden Infant Death Syndrome).

Neither was there any evidence offered that a child would cry out to summon assistance before succumbing to SIDS. And, again, the evidence does not show that the petitioner-mother was too impaired to hear her child cry out. Finally, it is plain that she did not leave this child alone but rather had put her in the care of another responsible adult, her father. DCF does not claim that the petitioner-father was too impaired to respond to the infant. The weight of the evidence indicates that the infant died due to misfortune, rather than abuse.

DCF argues, as well, that the petitioner-mother placed her child at "risk of harm." In order to prove this, DCF must prove that the petitioner-mother created "a significant

danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse." 33 VSA § 4912(4). DCF argues that this definition is met because the petitioner-mother was too impaired to care for her child and shared her bed with the child, both of which created a "serious danger that the child would suffer serious harm" based on a physical injury.

As pointed out previously, there is no evidence that the petitioner was impaired by drugs when she last saw the child alive, about 4:00 a.m. It is true that she was sleepy but she put the child in the care of the child's father while she went to sleep. No evidence was offered, and indeed it was not argued, that the petitioner-father was not a fit person to care for the child. Finally, the evidence clearly shows that while the petitioner was aware that the child was placed on the bed while she was falling asleep, there is no evidence that she knew that the father climbed into bed next to the infant to sleep. It was the petitioner-father's decision to "share the bed" with the infant while she slept, not the petitioner-mother's. It cannot be found on these facts that the petitioner-mother acted in a way that placed the child in serious danger of harm in the early morning of April 1, 2013.

As DCF failed to present evidence showing that the petitioner-mother likely harmed her infant or put her infant

at risk of harm on April 1, 2013, both of these substantiations must be reversed as not consistent with the statute. 3 VSA § 3091(D), Fair Hearing Rule 1000.4(D).

Substantiation Against the Petitioner-Mother and Substantiation Against the Petitioner-Father for Risk of Harm Due to Their Child's Unsupervised Access to Drug Paraphernalia

Two of the substantiations arose from the same set of facts, namely the presence of drug paraphernalia with drug residues found in the petitioners' apartment which was accessible to the three-year-old child. The issue, again, is whether the petitioners, who indisputably lived in the same apartment with their child, "created a significant danger that a child will suffer serious harm other than by accidental means, which harm would be likely to cause physical injury, neglect, emotional maltreatment or sexual abuse." 33 VSA § 4912(4). Under DCF's interpretive policy:

> Risk of harm is substantiated when the person responsible for the child's welfare:
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> . . .
>
> 4. Did not appropriately supervise the child in a situation in which drugs, alcohol or drug paraphernalia are accessible to the child.
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> DCF Family Services Policy Manual No.56

The Board must consider and follow DCF's interpretive policies insofar as they do not conflict with the statute itself. *In re R.H.*, 2010 VT 95. On its face, this policy could be considered problematic if the drug paraphernalia was not actually used to administer drugs or had been cleaned and presented no danger of harm to the child. However, for reasons cited below, that is not an issue in this case.[1]

DCF has presented clear evidence that over two dozen items that had been actively used in the delivery of drugs -- syringes, rubber bands, drug wrappers, pipes, tubes, and measuring spoons -- were found in the apartment and, in addition, many contained residues of Ritalin, Suboxone, Oxycodone, and cocaine, all potentially harmful controlled substances. While there was no evidence that the particular residues found were of sufficient quantity and strength to actually harm the three year old, the fact that there was *any* amount of a controlled substance on the paraphernalia proved that the parents did not clean objects after using them to administer drugs thereby creating a significant risk of future serious harm from drug ingestion for their child.

DCF has also presented credible and persuasive evidence that the three-year-old child could have easily accessed

[1] The paraphernalia language found in Policy 56 was recently moved by the legislature into the statute itself as 33 VSA § 4912(14)E. See, "An act relating to improving Vermont's system for protecting children from abuse and neglect", S.9, Section 3, passed May 15, 2015 amending 33 VSA § 4912, effective July 1, 2015.

some, if not all, of this tainted paraphernalia because it was found in plain sight in several rooms of the apartment. The evidence made it very likely that the petitioners were not supervising access to the drug delivering devices by their child. The petitioners' claim that the paraphernalia was secured behind a baby gate was just not credible based on the observations of the two police officers that the paraphernalia was not only in the parents' bedroom but also in all of the common areas. The laboratory reports showed that even items found outside of the bedroom -- the spoons in the kitchen -- had controlled substances on them. The petitioners never made an argument and, indeed, would have been hard pressed to do so, that even if there was accessible paraphernalia in most of the rooms used by their child, they had taken extraordinary measures to protect her at every moment from these many hazards.

It must be found that DCF showed by a preponderance of the evidence that the petitioners created a significant risk to their child of serious harm through ingestion of dangerous drugs because they did not adequately supervise her in a situation in which she had easy access to an abundance of paraphernalia which had been used to deliver controlled substances, was not cleaned, and some of which contained unspecified amounts of these dangerous drugs. As such, DCF has presented evidence not only that meets the criteria for risk of harm (unsupervised access to drug paraphernalia)

found in Policy 56 but which also falls squarely within the definition of "risk of harm" found in the statute at 33 VSA § 4912 (4). As DCF has shown that the petitioners did create a "risk of harm" for their daughter as defined in the statute and policy, its decision to substantiate the petitioner-mother and petitioner-father must be upheld as consistent with the statute and policy. 3 VSA § 3091(d), Fair Hearing Rule 1000.4 (D).

Substantiation Against the Petitioner-Mother For Placing Her Three Year Old at Risk of Harm Due to Drug Ingestion

The petitioner-mother was found by DCF to have exposed her child to drugs when she allegedly drank from a soda can into which the petitioner-mother had expelled a drug from a syringe in the course of flushing it out. Again, in order to meet its burden, DCF must show by a preponderance of the evidence that the petitioner-mother created a significant risk of serious harm to her child through her actions on the day in question, September 14, 2013. 33 VSA § 4912(4). DCF had expected the witness to this alleged event, a former neighbor of the petitioner-mother, to testify at hearing but she did not make herself available at the day and time scheduled. DCF did not ask to reconvene the hearing to take further testimony. The petitioner denies the events and the

toxicology report did not show any drugs in the child's system.

The only evidence offered to prove this matter is the social worker's testimony that, during questioning of the child at the hospital, she reported that she vomited. The social worker admitted that the three-year-old child seemed too young to understand the difference between the truth and a lie and gave no context for her statements. Even if this testimony were admissible under some exception to the hearsay rule, it is too vague and unreliable to form the basis for a finding that the child ingested a controlled substance, let alone who might have been responsible for that occurrence. There is simply no credible evidence here that the petitioner-mother acted in the way allegedly reported by her neighbor on September 14, 2013. As there is no evidence to support DCF's substantiation, the Board must reverse it. 3 VSA § 3091(d), Fair Hearing Rule 1000.4(D)

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